Supreme Court, U. S.
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No. 75-374

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

Rita F. Warren,
Petitioner

v.

Joseph E. Killory,

individually and in his capacity as Superintendent of Schools, City of Brockton, Commonwealth of Massachusetts
and
James L. Green,

individually and in his capacity as Chairman, School Committee, City of Brockton, Commonwealth of Massachusetts,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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Leon Aronson
440 Hancock Street
Quincy, Massachusetts

Alan S. Kaplan
440 Hancock Street
Quincy, Massachusetts

Attorneys for
Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. _____

RITA F. WARREN,
Petitioner

vs.

JOSEPH KILLORY ET AL.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the First Circuit.

Petitioner, Rita F. Warren, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on June 17, 1975.

OPINIONS BELOW

The Opinion of the Court of Appeals is unreported and is reproduced in Appendix A to this Petition. The Opinion of the District Court is unreported and is reproduced in Appendix B to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 17, 1975. This Court has jurisdiction pursuant to 28 U.S.C.A. §1254(1) and 28 U.S.C.A. §2101(c).

QUESTIONS PRESENTED

1. Whether audible prayer by a single student, or small group of students, voluntarily conducted, in a public school facility, at a time that does not interfere with the school program, and without teacher participation or involvement of either school or church

officials, is prohibited by the establishment clause of the First Amendment, as applied to the States by the Fourteenth Amendment.

2. Whether the absolute prohibition, by school officials, of voluntary oral prayer by a student, or small group of students, in a public school facility, at a time that does not interfere with the school program, is violative of the First Amendment guarantees of free exercise of religion and freedom of speech, as applied to the States by the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

> speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

62 Stat. 928, 28 U.S.C.A. §1254 provides in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...."

62 Stat. 961-62, 28 U.S.C.A. §2101 provides in pertinent part:

"(c) Any other appeal or any writs of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree."

R.S. §1979, 42 U.S.C.A. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

62 Stat. 932, 28 U.S.C.A. §1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in further-

ance of any conspiracy mentioned in section 1985 of Title 42;
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

62 Stat. 964, 28 U.S.C.A. §2201 provides in pertinent part:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force, and effect of a final judgment or decree and shall be reviewable as such."

62 Stat. 964, 28 U.S.C.A. §2202 provides:

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

St. 1966, C130, M.G.L.A. c.71 §1A provided:

> "At the commencement of the first class each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

M.G.L.A. c.71 §1A, as amended by St. 1973, c.621, provides:

> "At the commencement of the first class each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in."

STATEMENT OF THE CASE

Petitioner, Rita F. Warren, is a resident and taxpayer in the City of Brockton, Commonwealth of Massachusetts.

In the fall of 1969, petitioner's daughter, Theresa S. Warren, who was enrolled in the Brockton School System and attended eighth grade classes at East Junior High School of Brockton, a public school, requested permission to pray orally in the school, without teacher involvement, either before class or during recess or lunch, in the classroom or in some other designated room, either alone or with any other student who wished to join her. School officials denied these requests. Because her daughter was prohibited from praying aloud in the classroom or other designated area of the school, petitioner withdrew her daughter from the public school system for the remainder of the year. Following a summer school course,

Theresa returned to public school in September of 1970, attending ninth grade classes at Brockton High School. When she had acquired sufficient funds, petitioner enrolled her daughter in a parochial school, the Cardinal Spellman High School, in September of 1971 until her graduation in 1974.

Petitioner sought, through appropriate administrative channels, an order or regulation which would permit students to utter oral prayers either during the one minute period of silent meditation conducted prior to the commencement of class each day, as authorized by Mass. Gen. Laws, c.71, §1A, or during some alternative time period, in some location within the school, preferably a room designated as a prayer room or non-denominational chapel.

The administrative approach proving unsuccessful, petitioner instituted a civil suit, individually and on behalf of her

minor daughter, in the United States District Court for the District of Massachusetts, seeking declaratory, injunctive and monetary relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201-2, for deprivation of rights, privileges and immunities under the First and Fourteenth Amendments to the United States Constitution. She specifically sought a declaration that the practices and policies of the Brockton School District prohibiting voluntary oral prayer on school property are unconstitutional. Jurisdiction of the District Court is based on 28 U.S.C. §1343(3).

The District Court, although finding that the petitioner had standing to raise the claim, denied the requested relief in an Opinion and Order dated February 4, 1975.

The Court of Appeals for the First Circuit affirmed the District Court in a

Memorandum and Order dated June 17, 1975.

REASONS FOR GRANTING THE WRIT

Petitioner submits that in this case the Court of Appeals for the First Circuit has decided federal questions of great substance which have not been, but should be, settled by this Court.

Prior decisions of this Court which come closest to the instant case are McCollum v. Board of Education, 333 U.S. 203, 67 S.Ct. 461, 92 L.Ed. 649; Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954; Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601; and Abington School Dist. v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844. These decisions do not, however, settle the questions presented by this case.

In this case, unlike those above, the force of the public school system would not be used to propagate religion. The

case does not involve the recitation of prayers in unison by students, compelled by law to attend school, as part of the prescribed curricular activities, the situation present in Engel and Schempp. It does not involve direct cooperation between organized religious groups and school officials nor formalized religious instruction conducted in the classroom by religious teachers, as did McCollum.

This case merely involves voluntary, self-initiated prayer by a student, or small group of students, without teacher participation, somewhere on school grounds, at a time and in a location which does not interfere with the school program or infringe upon the rights of others. To permit this activity would be no more of an establishment of religion than the "released time" program found to be constitutionally valid in Zorach. In fact, volun-

tary involvement of school officials would, in all likelihood, be less than in Zorach, where teachers received, and presumably acted upon, weekly reports of the churches containing names of those youngsters released who did not report for religious instruction. The fact that prayer would be uttered on school property, unlike the situation in Zorach, should not, in itself, be considered to effectuate an establishment of religion. As indicated by Mr. Justice Brennan, in Schempp, the real gravamen of the use of the school building in McCollum was not the expenditure of public funds, but the investiture of the religious teacher with "all the symbols of authority at the command of the lay teacher...." 374 U.S. at 261-63.

The establishment clause seeks to prevent the sponsorship, financial support and active involvement of the sovereign in

religious activity. Walz v. Tax Commission, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697, 701. However, the problem of the separation of Church and State, like many problems in constitutional law, is one of degree. Zorach v. Clauson, supra, at 314. Petitioner submits that voluntary oral prayer on school premises, without involvement of Church or State officials, presents a degree of involvement by the sovereign in religious activity which, unlike Schempp, Engel or McCollum, is passive and de minimis and, therefore, presents a question novel to this Court. School officials have merely been asked to tolerate oral prayer, and tolerance is on the level of accommodation rather than establishment.

Such a question, in addition, is one of great substance.

Mr. Justice Stewart, dissenting in

Schempp, believed that the allowance of prayer before the start of the school day would merely "provide an opportunity for voluntary expression of religious belief" 374 U.S. at 318. Can such voluntary expression of religious belief be considered an establishment of religion when the presence of religious symbols on public properties has been frequently held to be constitutionally permissible? See e.g., Anderson v. Salt Lake City Corporation, 10th Cir., 475 F.2d 29, cert. denied 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (monument of Ten Commandments on courthouse grounds); Meyer v. Oklahoma City, 496 P.2d 789, cert. denied 409 U.S. 980, 93 S.Ct. 314, 34 L.Ed.2d 244 (fifty foot Latin Cross on public fairgrounds); Opinion of the Justices, 108 N.H. 97, 228 A.2d 161 (plaque with words: "In God We Trust" in public classrooms). If such

voluntary oral prayer by students is determined to be violative of the establishment clause, can the practice of opening every session of Congress with a prayer be constitutionally valid? Can the invocation by the crier of this Court--"God save the United States and this Honorable Court" --be considered constitutionally firm if a student's uttering the word "God" aloud on school grounds is considered constitutionally infirm? Can a presidential prayer breakfast or the inscription "In God We Trust" on our coins and currency be sanctioned any more than voluntary oral prayer on school property, if the latter is deemed to be violative of the First Amendment?

Petitioner submits that the aforementioned questions must be answered in the negative. To paraphrase the Court in Zorach, the concept of the separation of Church and State would have to be pressed

to the extremes of declaring the above activities violative of the establishment clause to condemn voluntary oral religious expression in a public school facility on constitutional grounds.

Petitioner further submits that the absolute prohibition by school officials of voluntary oral prayer conducted in a manner which would not interfere with the school program or infringe upon the rights of others violates the First Amendment guarantees of free exercise of religion and freedom of speech.

Religious expression and freedom of speech have often been equated by this Court. See Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S.Ct. 591, 87 L.Ed. 1292; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213. In this case petitioner requests that students be able to "speak to God", a form of com-

municative expression, as well as religious exercise.

A student in whom sincere religious beliefs have been instilled may feel a moral duty to pray aloud, for God's guidance or to thank Him, at some point during the school day. Failure to perform such a moral duty may carry a severe cost to the principled individual in terms of a supernatural sanction or a loss of moral self-respect. See Clark, "Guidelines For The Free Exercise Clause", 83 Harv. L. Rev. 327, 337. The choice between abandoning one's moral duty and religious convictions or abiding by them and facing possible sanctions, if detected engaging in audible prayer on school property, imposes an impermissible burden on the free exercise of religion. Compare Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965, 970-71.

It is fallacious to assume that a student's rights of freedom of speech and free exercise of religion are not violated by the prohibition of oral prayer in school merely because he or she can pray aloud before entering school in the morning and after leaving school in the afternoon. If the lawmakers of our nation are entitled to ask for divine blessing upon their work, and thereby speak to God, are not students so entited? Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines School Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737. Tinker and Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266, are emphatic in the notion that First Amendment freedoms apply with equally vital force in the schools as in the community at large.

Poulos v. New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105, wherein this Court upheld the requirement that a license be obtained prior to conducting a religious service in a public park, cannot serve as blanket authority for the proposition that the free exercise of religion and freedom of speech are not violated by the absolute prohibition of voluntary oral prayer on school property. Petitioner submits that the question of whether such prayer, conducted in a manner calculated not to interfere with the school program or infringe upon the rights of others, is violative of the constitutional guarantees of freedom of religion and/or freedom of speech is a question of great substance which is novel to this Court and, contrary to the opinions of the Courts below, is not settled by Poulos.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

Leon Aronson
440 Hancock Street
Quincy, Massachusetts 02171

Alan S. Kaplan
440 Hancock Street
Quincy, Massachusetts 02171

Counsel for Petitioners

APPENDIX A

Opinion of the Court of Appeals for
The First Circuit:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1089

RITA F. WARREN,
Plaintiff, Appellant,

v.

JOSEPH E. KILLORY, et al.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
McENTEE and CAMPBELL, Circuit Judges.

MEMORANDUM AND ORDER
Entered June 17, 1975

The first amendment does not confer upon persons a right to engage in public prayer in state-owned facilities wherever and whenever they desire. Poulos v. New Hampshire, 345 U.S. 395, 405 (1953). The refusal to permit such prayer in school is not an establishment of Atheism. Abington

School Dept. v. Schempp, 374 U.S. 203, 225 (1963). Defendants afforded students a minute for silent meditation at the start of the school day. Mass. Gen. Laws, ch. 71, §1A. They acted well within their powers in concluding that plaintiff must content herself with having her child pray aloud before nine or after three. Stein v. Oshinsky, 348 F.2d 999, 1001-02 (2d Cir. 1965).

Affirmed.

APPENDIX B

Opinion of the United States District Court
for the
District of Massachusetts

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RITA F. WARREN	)	
	)	
V.	)	CIVIL ACTION
	)	NO. 73-1823-T
JOSEPH KILLORY ET AL.	)	

OPINION AND ORDER

TAURO, D.J. February 4, 1975

This is a civil action seeking declaratory, injunctive and monetary relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201-2 for deprivation of rights, privileges and immunities under the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is based on 28 U.S.C. §1343(3).

Plaintiff, a resident and taxpayer of

the City of Brockton, Massachusetts, brings this action individually and on behalf of her daughter, a minor, seeking a declaration that the policies and practices of the Brockton School District are unconstitutional insofar as they prohibit voluntary, oral prayer by plaintiff's daughter while she is on school property. Defendant alleges that plaintiff has no standing to bring this action since her daughter has not been in the Brockton school system since 1969. Defendant further claims that the present practices of the Brockton School District are not unconstitutional and reflect only an implementation of previous Supreme Court decisions in this area.

FINDINGS OF FACT

Following a non-jury trial, the court makes the following findings of fact. In the fall of 1969, Theresa S. Warren was enrolled in the Brockton school system and

attended eighth grade classes at East Junior High School of Brockton, a public school. While attending that school, she resquested permission to pray orally in the school, without teacher involvement, either before class, during recess or lunch, in the classroom or in some other designated room, either alone or with any other student who wished to join her. These requests were denied by school officials. When informed of this, plaintiff, Theresa's mother, took her out of the public school system for the remainder of that school year. Following a summer school program, Theresa returned to the public school system in September of 1970 for one year, attending ninth grade classes at Brockton High School.

Having acquired sufficient funds, Mrs. Warren enrolled her daughter in a parochial school, the Cardinal Spellman High School,

in September of 1971. Theresa remained at Cardinal Spellman for the last three years of her high school education, graduating in June 1974. Plaintiff has alleged and this court finds as a matter of fact that the sole reason why plaintiff withdrew her daughter from the Brockton public school system was the fact that her daughter was prohibited from praying aloud either in the classroom or in another designated area of the school.

The school system is authorized and does allow, pursuant to Mass. Gen. Laws, ch. 71, §1A, a one minute period of silence for meditation prior to the commencement of class each day. The school does not allow students to use this period or any other period of the school day to utter oral prayers in the classroom or any other designated area of the school.

Plaintiff sought, through appropriate

administrative channels in the school system, an order or regulation allowing students to utter oral prayers during this period. In the alternative, plaintiff sought to have the school set aside a room in the school for some period of each day to be used as a prayer room or non-denominational chapel.

STANDING

Since plaintiff has included in her claim a request for monetary damages for expenses incurred in having her daughter transferred from public school to private school and has alleged that this transfer was required because defendant abridged her daughter's First Amendment rights, plaintiff has standing to raise this claim, notwithstanding that her daughter is not now enrolled in the Brockton public school system. Similarly, the fact that plaintiff's daughter has graduated does

not render the issue moot, since plaintiff seeks monetary relief for expenses incurred because of defendant's alleged unconstitutional activities. See e.g., Monroe v. Pape, 365 U.S. 167 (1961); United States ex rel. Jones v. Rundle, 453 F.2d 147, 150 (3rd Cir. 1971).

CONCLUSIONS OF LAW

Plaintiff's first claim, that the school system was required to allow students to utter oral prayers in the classroom, must fall on the authority of School District of Abington Township v. Schempp, 374 U.S. 203 (1963). That case held unconstitutional, as a violation of the First Amendment, the practice of commencing the school day with a recitation of the Lord's Prayer. Plaintiff concedes that any organized prayer would be impermissible, but urges that school officials be required to provide the occasion and facility for stu-

dents, either alone or in assembly, to offer individual prayers, out loud, at the same time. The program suggested by the plaintiff would be constitutionally infirm since it would require an impermissible involvement of the school system in religious practices. See Commissioner of Education v. School Committee of Leyden, 358 Mass. 773, 267 N.E.2d 226, cert. denied 404 U.S. 849 (1971).

Plaintiff argues in the alternative that the school should be required to set aside a classroom where students could pray without teacher participation. This is but another version of the "release time" approach found impermissible in McCollum v. Board of Education, 333 U.S. 203 (1948). In that case, the school allowed students to be released from their secular education to attend religious classes on school property. The religious classes

were not conducted by school officials. The only involvement of the school was in furnishing a place where the classes could be held and in releasing the students to attend those classes. The Court held that such a practice constituted a violation of the Establishment Clause of the First Amendment. McCollum is controlling with respect to plaintiff's alternate request and it must be denied, therefore, as being in violation of the Establishment Clause.

Even assuming that the Establishment Clause would not prohibit the school from permitting in its public schools the program that plaintiff has requested, this court could not order the school district to adopt such a policy unless the Free Exercise Clause or the Freedom of Speech Clause compelled such a result. Neither provision requires a state to permit per-

sons to engage in public prayer in state-owned facilities wherever and whenever they desire. Poulos v. New Hampshire, 345 U.S. 395 (1953). The status of students is not so unique as to warrant a federal court order compelling a community to provide them with religious facilities. While students are compelled to attend school, that does not render the regular religious facilities of the community less accessible to them than they are to other residents. School District of Abington Township v. Schempp, 374 U.S. at 299. (Brennan, J. concurring). "After all that the states have been told about keeping the 'wall between church and state . . . high and impregnable,' it would be rather bitter irony to chastise [the school district] for having built the wall too tall and too strong." Stein v. Oshinsky, 348 F.2d 999, 1002 (2d Cir. 1965) (citation

omitted).

The present practice of the Brockton school system--allowing a minute of silent meditation before the commencement of the school day--is consistent with the independent coexistence mandated by the First Amendment with respect to church and state. To grant the relief requested by the plaintiff would violate this mandate.[1] Accordingly, the complaint is dismissed.

So ORDERED.

FOOTNOTES

1. The posture of this case raises a substantial question wholly apart from the merits of plaintiff's First Amendment claim. The defendant has argued that to enter an order granting plaintiff the requested relief would be a violation of the Eleventh Amendment in that it would require the expenditure of municipal funds by federal court order to establish a prayer room at the school. See Edelman v. Jordan, 415 U.S. 651 (1974). Since plaintiff's claims must be dismissed for the grounds stated above, the court does not reach the merits of this argument.